IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In re the Marriage of:	)	**No. 23821-1-III**
MARINA MICHELLE ODEGARD,	)	
	)	**Division Three**
Respondent,	)	
	)	
v.	)	**UNPUBLISHED OPINION**
	)	
JAMES FRANKLIN BEHLA,	)	
	)	
Appellant.	)	
	)	

BROWN, J.—Pro se, Marina M. Odegard and James F. Behla jointly filed various marriage dissolution forms. Mr. Behla waived further notice prior to entry of the decree. Without further notice to Mr. Behla, Ms. Odegard appeared in court eight months later with an attorney and entered the final papers. Mr. Behla unsuccessfully moved to vacate on CR 60(b)(1), (4), (5), and (11) grounds, and for lack of subject matter jurisdiction. The court abided by the parties' stipulation regarding the parenting and child support provisions, and later struck a non-conforming hold-harmless provision. Mr. Behla appealed. Because the court did not abuse its discretion in

denying Mr. Behla's motion, and since Mr. Behla submitted to the court's jurisdiction, we affirm.

FACTS

The couple married in Washington in July 1995 and separated in September 2002. On August 22, 2003, they signed and filed a joint dissolution petition in Chelan County using pro se forms. In joining the petition, Mr. Behla agreed "to the entry of a decree in accordance with the petition, without further notice." Clerk's Papers (CP) at 399. The parties listed separate Leavenworth living addresses. They averred living in Washington during the marriage, Mr. Behla's residence in Washington at filing, and that Ms. Odegard was continuing to reside in Washington. The petition alleged jurisdictional facts for the couple's two children.

The petition asked the court to divide assets according to the parties' joint recommendations and included a jointly executed and acknowledged proposed parenting plan. The plan partly states: "Parties are aware of the relocation statute and agree mother may relocate the children to Colorado each school year." CP at 352. Jointly, the parties successfully sought temporary support and parenting orders. The next day, August 26, the parties jointly filed to permit Ms. Odegard to relocate to Basalt, Colorado for the 2003-04 school year, due to the seasonal nature of their work.

On May 13, 2004, Ms. Odegard appeared with counsel, entering findings and conclusions, a parenting plan, a child support order, and a decree of dissolution. The final papers were prepared by her counsel

and were not signed by Mr. Behla.

On June 21, 2004, Mr. Behla through counsel filed a CR 60(b)(1) and (11) vacation motion. Said motion was heard on July 8, 2004 and was denied for failing to meet CR 60 requirements. By stipulation, the court vacated portions of the Decree and incorporated the parenting plan, order of support and child support worksheets. On August 26, Mr. Behla, by new counsel, filed a motion to set aside the decree pursuant to CR 60(b)(1), (4) and (5) and for lack of subject matter jurisdiction, including his declaration suggesting the parties' residence has been in Basalt, Colorado since 2001. Ms. Odegard filed a contrary declaration that explained routinely traveling to Colorado for work reasons.

On November 4, 2004, the trial court entered orders denying both the June and August motions. Mr. Behla unsuccessfully moved for reconsideration. The court reasoned Mr. Behla's signature had made him a party and the property division was the same as he had requested and fair. Considering the parties' declarations concerning the intervening circumstances, the court was not convinced Mr. Behla's "failure, if it can be called such" to withdraw his joinder in the petition was the result of mistake, inadvertence, surprise or excusable neglect. CP at 16. The court decided the parties were Washington residents when the petition was filed, noting the petition affirmatively showed both parties were Washington residents and Mr. Behla had consented to jurisdiction by jointly filing the petition. The court observed Mr. Behla was estopped from asserting any jurisdictional issues. Mr. Behla appealed.

ANALYSIS

A. Jurisdiction

The issue is whether the trial court erred in asserting subject matter jurisdiction over this marriage dissolution proceeding despite Mr. Behla's Colorado residency claim.

The determination of subject matter jurisdiction is a question of law reviewed de novo. *In re Marriage of Kastanas*, 78 Wn. App. 193, 197, 896 P.2d 726 (1995). Subject matter jurisdiction is "the authority of the court to hear and determine the class of actions to which the case belongs." *In re Adoption of Buehl*, 87 Wn.2d 649, 655, 555 P.2d 1334 (1976).

Marriage dissolution is a statutory proceeding with court jurisdiction and authority prescribed by statute. *In re Marriage of Moody*, 137 Wn.2d 979, 976 P.2d 1240 (1999). RCW 26.09.030 gives Washington residents a right to a dissolution decree 90 days after filing the petition, if filing jointly, and alleging the marriage is irretrievably broken. RCW 26.09.030(1). "Residence" in this context means "domicile." *In re Marriage of Strohmaier*, 34 Wn. App. 14, 16, 659 P.2d 534 (1983).

The indispensable domicile elements are residence in fact coupled with intent to make the residence home. *In re Estate of Lassin*, 33 Wn.2d 163, 165-66, 204 P.2d 1071 (1949). Once acquired, domicile is presumed to continue until changed. *Stevens v. Stevens*, 4 Wn. App. 79, 82, 480 P.2d 238 (1971). The burden of proving a change in domicile rests upon the one who asserts it, and must be shown by substantial evidence. *Lassin*, 33 Wn.2d at 168;

Stevens, 4 Wn. App. at 82. In sufficiency terms, the good faith of the party asserting the domicile change should be considered, focusing on declarations of intent. *Sasse v. Sasse*, 41 Wn.2d 363, 366, 249 P.2d 380 (1952).

The petition jointly avers residency. "'A verified assertion in a pleading is a conclusive concession of the truth of the matter pleaded. Such an assertion is not treated procedurally as evidence, but it may be relied upon by the parties and the court as part of the case.'" *In re Marriage of Wherley*, 34 Wn. App. 344, 349, 661 P.2d 155 (1983) (quoting *Brecher v. Gleason*, 27 Cal. App. 3d 496, 499 n.1, 103 Cal. Rptr. 831 (2nd Dist. 1972)). Notwithstanding Mr. Behla's contrary assertions, Ms. Odegard declared her and her husband's connections with Washington state.

Mr. Behla incorrectly asserts RCW 26.09.030 imposes a 90-day post-petition residency requirement. This is not a case of post-petition residency for military personnel to establish state nexus over a non-domiciliary. *In re Marriage of Ways*, 85 Wn.2d 693, 538 P.2d 1225 (1975).

Mr. Behla correctly argues subject matter jurisdiction cannot be conferred by estoppel. *Jones v. Dep't of Corr.*, 46 Wn. App. 275, 730 P.2d 112 (1986). While jurisdiction may be raised at any time, when mentioning estoppel the court merely noted the powerful effect of Mr. Behla's voluntary joinder in the critical dissolution papers as a persuading factor when rejecting Mr. Behla's contrary declaration. Given all, the trial court properly concluded it had subject matter jurisdiction given the facts of this case.

B. CR 60(b) Contentions

The issue is whether the trial court erred in denying Mr. Behla's motion to vacate the final dissolution papers under CR 60(b). Specifically, he raises: CR 60(b)(1), "excusable neglect or irregularity in obtaining a judgment or order"; CR 60(b)(4), "[f]raud . . ., misrepresentation, or other misconduct of an adverse party"; CR 60(b)(5) "judgment is void"; and CR 60(b)(11), "any other reason justifying relief from the operation of the judgment."

A trial court's denial of a motion to vacate under CR 60(b) is reviewed for an abuse of discretion. *Haley v. Highland*, 142 Wn.2d 135, 156, 12 P.3d 119 (2000). Errors of law are not proper grounds under CR 60(b). *Id.*

First, no irregularity exists. Under CR 60(b)(1) irregularities "occur when there is a failure to adhere to some prescribed rule or mode of proceeding, such as when a procedural matter that is necessary for the orderly conduct of trial is omitted or done at an unseasonable time or in an improper manner." *Mosbrucker v. Greenfield Implement*, *Inc.*, 54 Wn. App. 647, 652, 774 P.2d 1267 (1989). Mr. Behla shows no failure to adhere to a prescribed rule or proceeding mode. Normally, a party is entitled to notice and an opportunity to be heard before being deprived of a property interest. *Marriage of Wherley*, 34 Wn. App. at 347.

However, notice is not required where the parties join in the request for relief because the risk of an erroneous determination is negligible. *Id.* The petition states "By joining in the petition, the respondent agrees to the entry of a decree in accordance with the petition, *without further notice*."

CP at 399 (emphasis added). Thus, notice was waived. Notably, the court later vacated the sole non-conforming, hold-harmless relief provision, thus eliminating the due process notice problem. And, not telling the court about Mr. Behla's allegedly changed conduct or feelings is not an "irregularity" as that term is contemplated by CR 60(b)(1). The trial court did not err in rejecting this ground.

Second, Mr. Behla does not show excusable neglect under CR 60(b)(1) in failing to file a formal withdrawal of joinder. His subjective belief that further signatures were required to finalize the dissolution is unhelpful. Excusable neglect is determined on a case-by-case basis. *Norton v. Brown*, 99 Wn. App. 118, 123, 992 P.2d 1019 (1999). Excusable neglect is not established when a party disregards process, whether willful or due to inattention or carelessness. *Commercial Courier Serv. Inc. v. Miller*, 13 Wn. App. 98, 106, 533 P.2d 852 (1975).

Here, by joining in the dissolution petition, Mr. Behla set into motion the events leading to the decree because the petition allowed entry without further notice. Mr. Behla could have withdrawn his joinder or amended the pleadings to conform to his after-expressed views. That he may be legally inexperienced and unknowledgeable does not constitute mistake, inadvertence, surprise, or excusable neglect. Pro se litigants are bound by the same rules of procedure and substantive law as attorneys. *Westberg v. All-Purpose Structures*, 86 Wn. App. 405, 411, 936 P.2d 1175 (1997). The new dissolution forms still allow notice waivers when a party joins the petition.

Third, Mr. Behla does not show fraud or misrepresentation under CR 60(b)(4). While appearing unfair to Mr. Behla, the

record discloses no obligation for Ms. Odegard to disclose her intent to enter the final papers, to provide advance copies of the final papers (aside from the now cured hold-harmless provision), or to tell the court of his wavering feelings or contradictory conduct. Mr. Behla must prove by clear, cogent, and convincing evidence (1) Ms. Odegard made a knowing and false representation of material fact; (2) he was ignorant of that falsity; (3) he reasonably relied on the representation; and (4) he suffered damage. *Lindgren v. Lindgren*, 58 Wn. App. 588, 596, 794 P.2d 526 (1990); *N. Pac. Plywood, Inc. v. Access Rd. Builders, Inc.*, 29 Wn. App. 228, 232, 628 P.2d 482 (1981).

Mr. Behla argues fraud or misrepresentation to the court. He does not show Ms. Odegard defrauded or misled him. Her conduct in choosing the time and manner of entering the final papers, while appearing unfair to him, is ambiguous at best, not clear, cogent or convincing evidence of fraud or misrepresentation toward him. As noted, Mr. Behla failed to inform the court he no longer joined in the petition. No misrepresentation prevented Mr. Behla from earlier filing his withdrawal of joinder. Misrepresentation requires showing "specific knowledge and intent by the wrongdoer." *Sarvis v. Land Res., Inc.*, 62 Wn. App. 888, 893, 815 P.2d 840 (1991). While Mr. Behla may regret not acting sooner, Ms. Odegard's conduct does not fall within CR 60(b)(4) because in the context of the rule the decree was not unfairly obtained, considering his joinder.

Fourth, Mr. Behla argues even though the court vacated the hold-harmless term not provided for in the petition, the entire decree should have been voided under CR 60(b)(5). *In re Marriage of Hardt*, 39 Wn.

App. 493, 693 P.2d 1386 (1985). A court has no jurisdiction to grant relief beyond that sought in the complaint because of due process notice problems. *In re Marriage of Leslie*, 112 Wn.2d 612, 617-18, 772 P.2d 1013 (1989). However, the courts have consistently held since *Hardt* that a judgment is void solely to the extent it exceeds the relief requested in the petition. Under the circumstances, the trial court did not err in refusing to void the remainder of the decree.

Fifth, Mr. Behla attempts to stretch the "any other reason" terms of CR 60(b)(11) to apply here. But the use of CR 60(b)(11) is to be "'confined to situations involving extraordinary circumstances not covered by any other section of the rule.'" *In re Marriage of Yearout*, 41 Wn. App. 897, 902, 707 P.2d 1367 (1985) (quoting *State v. Keller*, 32 Wn. App. 135, 140, 647 P.2d 35 (1982)). "Such circumstances must relate to irregularities extraneous to the action of the court." *Yearout*, 41 Wn. App. at 902. The rule has previously been invoked in unusual situations which typically involve reliance on mistaken information. *In re Marriage of Tang*, 57 Wn. App. 648, 789 P.2d 118 (1990).

Mr. Behla does not persuade us the circumstances are "extraordinary" thereby justifying relief under CR 60(b)(11). We are not convinced these joinder facts are analogous to settlement agreements or CR 2A stipulations. CR 60(b)(11) is solely available in situations involving extraordinary circumstances not covered by any other section of the rule. *In re Marriage of Hammack*, 114 Wn. App. 805, 809, 60 P.3d 663 (2003). No grounds are argued under CR 60(b)(11) that were not suggested under CR

60(b)(1), (4), and (5).

In sum, we conclude the trial court did not abuse its discretion in denying Mr. Behla's CR 60(b) motions to vacate.

C. Stipulations

Finally, Mr. Behla contends the trial court erred in vacating the parenting plan and order of child support on Ms. Odegard's stipulation rather than vacating the entire decree. However, the record shows both parties agreed to the stipulations. Therefore, the trial court was authorized to vacate the orders and did not err. *See* RCW 26.09.260(1) (allowing modification of parenting plan by agreement).

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Brown, J.

WE CONCUR:

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Kato, J.

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Kulik, J.